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No. 88-57 (2)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

HERBERT M. FRIEDMAN,

Petitioner,

v.

PATRICK HALL, an individual,
JOSEPH KENNEDY, an individual,
JAMES WRIGHT, an individual, and
FRANK MEHARG, an individual,

Respondents.

On Petition for Writ of Certiorari to the
Sixth Circuit Court of Appeals

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

Are Respondents entitled to qualified immunity from Petitioner's civil rights action for damages under 42 USC §§ 1983 and 1985?

II.

Was the issue of Respondents' right to qualified immunity preserved for appellate review?

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STATEMENT OF THE CASE

Pari-mutuel horse racing in Michigan is legalized, licensed and regulated pursuant to the Michigan Racing Law of 1980, as amended; MCL 431.61 et seq, and the rules of the Racing Commissioner promulgated thereunder. The provisions of the Racing Law and rules in effect during 1982, as described herein, are not contested by the parties.

No person may participate in Michigan pari-mutuel racing in any racing occupation unless licensed annually by the Commissioner. Petitioner was licensed by the Commissioner to participate in pari-mutuel racing in Michigan during the year 1982 as both a veterinarian and a race horse owner.

Respondents Hall, Kennedy and Meharg were appointed and approved by the Racing

Commissioner pursuant to state statute and rule as independent contractors, to serve as the three required racing stewards or judges at the 1982 Saginaw Valley Downs race meeting. As the assigned stewards, they served as special deputies and representatives of the Racing Commissioner at Saginaw Valley Downs. They held both the title and function of racing judge at the meet, and were charged by statute and administrative rule with the duty and responsibility of enforcing the state racing law and rules of the Commissioner at the meet. In the exercise and discharge of their enforcement function, Respondent stewards were broadly empowered by statute and rule to conduct hearings and investigations concerning alleged rule violations; to examine witnesses under

oath regarding such violations; to make findings of fact and determine violations; and to decide and impose penalties against rule violators. Such penalties could include, in their discretion, suspension of the violator's racing license and racetrack privileges for whatever period the stewards deemed appropriate. All decisions and rulings of the stewards were appealable as of right to the Commissioner and to the state circuit court.

On June 9, 1982, licensed trainer Linda Droscha made a complaint to a state investigator at Saginaw Valley Downs regarding certain alleged misconduct by Petitioner at the track earlier that evening. In particular, Droscha alleged the following: that she had observed Petitioner enter the receiving barn and go

into the stall occupied by "Propolis", the horse that subsequently won the fourth race that evening; that she then observed Petitioner hand what appeared to be a loaded hypodermic syringe and needle to the owner of the horse inside the stall; that she next observed the owner take the needle and syringe around behind the horse out of her view, while Petitioner appeared to bend down and examine the front legs of the horse; that she believed that the owner may have illegally injected the horse with a drug while out of her view, because when he came back around from behind the horse, he returned an empty syringe and needle to Petitioner; that she then observed Petitioner take the needle and syringe and leave the horse's stall and exit the receiving barn.

The state investigator subsequently reported Droscha's allegations to Respondent stewards at the conclusion of the racing program on June 9, 1982. If true, Petitioner's alleged conduct constitutued a violation of Rule 59, which expressly prohibited all persons from entering the receiving barn on race night except the owners, trainers, drivers and grooms of the horses competing in that night's races, and such other persons specifically authorized by the Racing Commissioner. In addition, Petitioner's alleged conduct, if true, also constituted a violation of other provisions in the racing law and rules of the Commissioner which prohibited the possession of hypodermic needles and syringes and injectable drugs in restricted areas at

the track, such as the receiving barn, and the administration of drugs to race horses after they were entered to race. Because of the seriousness of the charges, Respondent stewards notified Petitioner of the charges the next day, and informed him that they were going to schedule and conduct a stewards hearing concerning the charges, to determine whether he had violated the racing law or rules of the Commissioner.

On June 24 and June 29, 1982, Respondent stewards conducted the hearing. During the hearing, the stewards received sworn testimony from Droscha, Petitioner, and several other witnesses, including Respondent Wright--a classified civil service employee of the Michigan Office of Racing Commissioner, employed in the

capacity of outstate racing supervisor. Petitioner was present throughout the two-day hearing and was advised by the stewards on the record at the start of the hearing that he could have an attorney represent him at the hearing if he wished. Petitioner chose to proceed with the hearing without counsel. During the hearing, Petitioner was permitted to confront and cross-examine each witness called by the stewards; to summon and question witneses on his own behalf; and to testify under oath and present argument on his own behalf. Both sessions of the hearing were tape recorded by the stewards and subsequently transcribed for administrative and judicial review.

During the hearing, Droscha essentially reiterated her previous

allegations against Petitioner under oath. Another witness, Charles Bond, testified that Droscha had informed him, prior to the fourth race on June 9, 1982, that she had witnessed Petitioner's apparent involvement in the injection of "Propolis" earlier that evening in the receiving barn. According to Bond, he subsequently saw Petitioner in the grandstand area after the fourth race and commented to him that the shot he had given "Propolis" must have worked since the horse won the race. According to Bond, Petitioner responded that it was just camphor, that the horse needs it and gets it every day. Respondent Wright provided testimony concerning two prior incidents during 1980 and 1981 at Jackson Harness Raceway in which Petitioner had been warned by racing

officials for similar violation of Rule 59 involving unauthorized veterinary contact with race horses on race night after they had been sequestered in the receiving barn. Petitioner admitted to the stewards during the hearing that he had entered the receiving barn at Saginaw Valley Downs on June 9, 1982, prior to the start of racing, to examine a cut on the leg of "Propolis" at the request of the horse's owner, but without required authorization of the Commissioner, in violation of Rule 59. However, he denied that he had ever possessed or handled a hypodermic needle or syringe while he was with "Propolis" in the receiving barn. He also denied any knowledge or involvement in the administration of any injection to "Propolis" in the receiving barn on

June 9, 1982, prior to the horse's participation in the fourth race.

On July 4, 1982, Respondent stewards joined in issuing a written ruling and Notice of Suspension against Petitioner based upon the testimony received during the stewards' hearing. In their ruling, the stewards found that Petitioner had knowingly and willingly entered the receiving barn at Saginaw Valley Downs on June 9, 1982, without necessary authorization, and had practiced veterinary medicine on "Propolis", in violation of Rule 59, after having already received two previous warnings from stewards regarding similar violations of Rule 59. The stewards concluded that Petitioner's conduct was detrimental to the best interests of Michigan racing, and

consequently ordered his license to participate in Michigan racing suspended and ruled him off the grounds of all Michigan racetracks from July 7, 1982 through December 31, 1982.

On July 7, 1982, Petitioner appealed to the Racing Commissioner for de novo review of the stewards' ruling and also requested a stay of the ruling pending the Commissioner's review and final decision on his appeal. The Commissioner denied Petitioner's request for a stay.

After the Commissioner's denial of his request for a stay of the stewards' ruling, Petitioner never attempted to obtain injunctive relief from the state circuit court to stay enforcement of the stewards' ruling during the pendency of

his appeal, although such judicial relief was potentially available under Michigan law. Hiers v Detroit Superintendent of Schools, 370 Mich 225, 136 NW2d 10 (1965); Reed v Civil Service Commission, 301 Mich 137, 3 NW2d 41 (1942).

Pursuant to Petitioner's appeal, a de novo hearing was scheduled and conducted on August 3, 1982, under the contested case provisions of the Michigan Administrative Procedures Act, MCL 24.271-24.287. The hearing was conducted by the Racing Commissioner's designated hearing officer, Deputy Commissioner John Conley.

On or about November 8, 1982, Mr. Conley submitted a written opinion to the Racing Commissioner recommending to the

Commissioner that he grant Petitioner's appeal and reverse the stewards' ruling. On or about December 21, 1982, the Racing Commissioner issued an order adopting Mr. Conley's opinion and reversing the stewards' ruling.

On July 1, 1985, Petitioner filed a civil rights Complaint in the United States District Court for the Eastern District of Michigan against Respondent stewards and Respondent Wright, under 42 USC §§ 1983 and 1985, essentially claiming in extremely broad and conclusory language that Respondents, acting separately and in conspiracy with each other, had "wilfully", "maliciously" and "unlawfully" exercised their power and position as state racing officials at the 1982 Saginaw Valley Downs race meeting "in bad faith",

by suspending his racing license and racetrack privileges "because of his religion".

Respondents initially responded to Petitioner's Complaint by timely filing answers with the District Court, denying Petitioner's claims and also asserted several affirmative defenses, including their entitlement to absolute or qualified immunity from Petitioner's suit.

On September 16, 1986, after the deadline for completing discovery had passed, Petitioner filed a Motion to Amend his Complaint, claiming that unspecified evidence obtained during discovery did not conform with his Complaint. In his Motion, Petitioner failed to state how he wished to amend his Complaint and gave no

specific reason why late amendment of his Complaint was either warranted or necessary. Respondents filed a written response opposing Petitioner's Motion for the reason that it was untimely and failed to state sufficient grounds or reasons to permit late amendment of the Complaint under FRCP 15. Thereafter, the Motion to Amend was never pursued further by Petitioner nor acted upon by the Court.

On October 3, 1986, after completion of discovery and more than 14 months after Petitioner had filed his Complaint, Respondents filed a Motion for Dismissal and/or Summary Judgment pursuant to FRCP 12(b)(6) and FRCP 56(b)(c), respectively, contending that they were entitled to summary judgment and/or dismissal based upon their entitlement to the defense of

absolute quasi-judicial immunity or, in the alternative, qualified good faith immunity. In addition, Respondents further contended in their Motion that they were entitled to dismissal and/or summary judgment because the allegations in Petitioner's Complaint were so vague, broad, conclusory and devoid of factual support or content that they were insufficient as a matter of law to state a claim upon which relief could be granted, and further, that there were no genuine issues of material fact for trial as to Petitioner's conclusory claims and Respondents' entitlement to immunity. In support of their Motion, Respondents filed extensive detailed affidavits attesting to their good faith and lack of religious bias or malice in the performance of their

respective official actions toward Petitioner. The stewards, in particular, attested in their affidavits to the specific legal authority, evidentiary support and reasons for the disciplinary action and penalties they had imposed against Petitioner. All four Respondents attested in their affidavits that Respondent Wright had no involvement in the decision to sanction Petitioner, and that his only involvement in the disciplinary proceedings against Petitioner had been that of a sworn witness during the stewards' hearing.

Petitioner subsequently sent a written answer and brief in opposition to Respondents' Motion to United States District Judge Lawrence P. Zatkoff, the assigned trial judge. In his response,

Petitioner argued that Respondents were not entitled to immunity and that Respondents' Motion was inappropriate on the "dawn of trial". In addition, Petitioner represented to the Court in his brief that he stood ready and able to produce several unnamed witnesses who could present unspecified evidence in support of his claims of bad faith, malice and religious bias on the part of Respondents. Despite his affirmative obligation under FRCP 56(e), Petitioner failed to present any evidence whatsoever to the Court by affidavit, deposition, exhibit or otherwise to show that there was a genuine issue for trial.

On October 24, 1986, the Final Pretrial Order, prepared and submitted jointly by the parties, was accepted and

entered by Judge Zatkoff. In the Final Pretrial Order, Petitioner stipulated and conceded that he did not contest the fact ... "That Respondents Hall, Kennedy, and Meharg were acting during the course of their employment and within the scope of their authority as the racing stewards and judges at the 1982 Saginaw Valley Downs race meeting when they decided and issued their ruling of July 4, 1982, against Dr. Friedman suspending his occupational licenses and denying him the privileges of the grounds of all licensed Michigan racetracks from July 7, 1982 through December 31, 1982." (R.34: Final Pretrial Order, Uncontested Facts, ¶ III.CC). Thereafter, the case was placed on the trailing trial docket for November and December, 1986, and January, 1987.

On January 12, 1987, Judge Zatkoff granted Respondents' Motion for Summary Judgment, finding that Respondents Hall, Kennedy and Meharg were absolutely immune from suit because of their quasi-judicial function as stewards in adjudicating and penalizing rule violations, and that Respondent Wright was also absolutely immune from suit as a witness under Briscoe v Lahue, 460 US 325, 75 L Ed 2d 96, 103 S Ct 1108 (1983).

Petitioner filed a timely appeal with the Court of Appeals for the Sixth Circuit, arguing in his brief on appeal that Respondents were not entitled to either absolute or qualified immunity. In response, Respondents argued in their brief on appeal that they were entitled to absolute quasi-judicial immunity or, in the alternative, qualified immunity.

On April 11, 1988, the Court of Appeals affirmed the decision of the District Court granting Respondents' Motion for Summary Judgment, but on different grounds, finding that "... Although ... absolute immunity may be warranted in this case under the teachings of Butz and Cleavinger, ... here defendants have established a claim of qualified immunity." (Petitioner's Appendix A, p A-6, including n. 4). With respect to Respondent Wright, the Court of Appeals expressly concluded that he was entitled to immunity under Briscoe v Lahue, supra, since Petitioner had offered no response to rebut Respondents' affidavits attesting to Wright's lack of participation in the decision to issue the stewards' ruling against Petitioner.

(Petitioner's Appendix A, p A-6). Finally, after review of the record on appeal, the Court of Appeals found that Petitioner had presented no evidence of religious bias on the part of the Respondents, and had failed to make out a prima facie case showing the existence of any material issue of fact for trial. (Petitioner's Appendix A, p A-7). Accordingly, the Court of Appeals affirmed summary judgment for Respondents, based upon their entitlement to qualified immunity.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT RESPONDENTS HAD AT THE VERY LEAST ESTABLISHED THEIR CLAIM TO QUALIFIED IMMUNITY AND WERE ENTITLED TO SUMMARY JUDGMENT ON THE BASIS OF SUCH IMMUNITY.

The dispute in this matter does not involve competing theories of law, but rather, the application of the established law to the facts on the record. Both parties agree that the controlling standard for determining whether a public official is entitled to the defense of qualified immunity was established by this Court in Harlow v Fitzgerald, 457 US 800, 73 L Ed 2d 396, 102 S Ct 2727 (1982).

In Harlow v Fitzgerald, supra, this Court enunciated and established the

controlling principles and guidelines for determining whether a public official is entitled to the defense of qualified immunity, as opposed to absolute immunity, from civil rights damage suits arising out of the official's exercise and discharge of official discretionary duties.

As noted in Harlow, 457 US at 806-807, the decisions of this Court have consistently held that government officials are entitled to the defense of either absolute or qualified immunity from civil rights damage suits based upon their exercise and discharge of discretionary official functions. Scheuer v Rhodes, 416 US 232, 240, 40 L Ed 2d 90, 94 S Ct 1683 (1974); Butz v Economou, 438 US 478, 496-497, 57 L Ed 2d 895, 98 S Ct 2894 (1978).

In determining the extent of immunity which public officials should have from civil rights damage suits for their official actions, this Court has attempted to balance two competing interests: the need for private lawsuits as a means of protecting civil rights and deterring unconstitutional conduct by public officials versus the public's need to encourage decisive official action in the public interest by protecting the official from suit. Harlow, 457 US at 813-814.

In attempting to strike the best balance between these two competing interests, this Court has determined that in general qualified immunity is the norm for most executive officials, and absolute immunity the exception. Harlow, 457 US at 807. This judicial determination has been

made with the assumption and expectation that the general availability of the defense of qualified immunity will permit executive officials to quickly obtain dismissal or termination of insubstantial civil rights damage suits through a properly supported motion for dismissal and/or summary judgment under FRCP 12(b)(6) or 56(b)(c), respectively. Harlow, 457 US at 808, 814; Butz, 438 US at 507-508.

Under Harlow, an official's entitlement to the defense of qualified immunity depends upon a wholly objective appraisal of the legal reasonableness of the official's discretionary actions, as measured by reference to clearly-established law. According to the Harlow standard for qualified immunity, officials

who perform discretionary functions are immune from suit for their official discretionary acts, if such acts do not violate clearly-established statutory or constitutional rights of which a reasonable person would have known. Harlow, 457 US at 818.

Application of the current standard for qualified immunity and the related underlying guidelines and principles for determination of official immunity enunciated and established by this Court in Harlow v Fitzgerald, supra; Butz v Economou, supra; Cleavinger v Saxner, 474 US ____, 88 L Ed 2d 507, 106 S Ct 496 (1985); and Briscoe v LaHue, 460 US 325, 75 L Ed 2d 96, 103 S Ct 1108 (1983), to the uncontroverted facts of this case, clearly indicates that the Court of

Appeals was correct in its holding that Respondents had established their claim to qualified immunity and were entitled to summary judgment on that basis.

First of all, based upon the unopposed and uncontroverted affidavits of Respondents, it is clear that Respondents were performing discretionary quasi-judicial functions within the scope of their statutory authority and responsibility as state racing officials, when they conducted the administrative disciplinary proceedings against Petitioner for his admitted violation of Rule 59.

Secondly, based upon the unopposed and uncontroverted affidavits of Respondents, it is equally clear that Respondents'

quasi-judicial conduct toward Petitioner in such disciplinary proceedings did not violate any clearly established statutory or constitutional rights of Petitioner of which a reasonable person in Respondents' position would have known.

A. RESPONDENTS WERE PERFORMING QUASI-JUDICIAL DISCRETIONARY FUNCTIONS WHEN THEY ALLEGEDLY VIOLATED PETITIONER'S CIVIL RIGHTS.

Both the District Court and the Court of Appeals properly followed a "functional approach" in analyzing the record in this case to determine whether Respondents were entitled to summary judgment on their motion under FRCP 56(b)(c) based upon their claim of either absolute or qualified immunity.

The only evidence in the record was provided by the affidavits and exhibits

submitted by Respondents in support of their summary judgment motion, since Petitioner, contrary to his obligation under FRCP 56(e), failed to present any evidence by affidavit, deposition, exhibit or otherwise to contradict Respondents' affidavits.

Petitioner essentially alleged in his Complaint, in broad conclusory language, that Respondents had maliciously and unlawfully exercised their power as state racing officials to enforce Rule 59 against him as a pretext for suspending his racing license and racetrack privileges and causing him harm "because of his religion."

According to the unopposed and uncontroverted affidavits of Respondent

stewards, they had investigated, adjudicated and penalized Petitioner for violation of Rule 59 at the 1982 Saginaw Valley Downs race meeting in good faith and without religious bias, pursuant to their broad discretionary authority and duty, as stewards and special deputies of the Racing Commissioner, under the state racing law and rules of the Commissioner. Applying the guidelines and principals of Butz and Cleavinger to the facts of this case, the District Court and the Court of Appeals both found that the stewards were independent, high level state racing officials who exercised and discharged quasi-judicial functions analogous to those of a judge or prosecutor when they conducted investigations and imposed penalties to enforce the racing law and

rules of the racing commissioner. As previously noted, Petitioner himself conceded in the Joint Final Pre-Trial Statement (R.34 ¶ III.CC) that Respondents stewards ... "were acting during the course of their employment and within the scope of their authority as ... racing stewards and judges ...", when they suspended his racing license and racetrack privileges for violation of Rule 59 at the 1982 Saginaw Valley Downs race meeting. Thus, it is evident from the record and the opinions of both lower courts that Respondent stewards were clearly performing quasi-judicial discretionary functions within the scope of their official authority, when they allegedly violated Petitioner's civil rights.

As to Respondent Wright, the record is equally clear that he too performed a

discretionary quasi-judicial function when he participated in the disciplinary proceedings against Petitioner. In particular, as noted by both of the lower courts in their respective opinions, the unopposed and uncontroverted affidavits of Respondents indicate that Wright's only involvement in the proceedings against Petitioner was as a witness at Petitioner's stewards' hearing. Thus, both Courts correctly concluded that Wright was entitled to immunity under Briscoe v Lahue, supra.

B. RESPONDENTS' OFFICIAL DISCRETIONARY CONDUCT DID NOT VIOLATE ANY CLEARLY ESTABLISHED STATUTORY OR CONSTITUTIONAL RIGHTS OF PETITIONER.

In accordance with the Harlow standard for qualified immunity, none of the quasi-judicial discretionary conduct performed

by Respondents in the disciplinary proceedings against Petitioner violated any statutory or constitutional rights of Petitioner of which a reasonable person would know. Rule 59 was one of the rules which the stewards were both empowered and obliged to enforce at the 1982 Saginaw Valley Downs race meeting. Petitioner admitted that he had violated the rule at the meet and that he had also been given two previous warnings for similar violations of Rule 59 at another track. By rule of the Commissioner, the stewards had broad authority and discretion to determine and impose penalties for violation of Rule 59. Such penalties could include suspension of the violator's racing license and racetrack privileges for whatever period the stewards deemed

appropriate. In view of the foregoing uncontroverted facts, the stewards could not be expected to know that their good faith suspension of Petitioner's racing license and racetrack privileges for violation of Rule 59 would violate Petitioner's civil rights. On the contrary, the conduct of the stewards and Mr. Wright during the disciplinary proceedings against Petitioner was wholly within the lawful scope of their authority and duties as state racing officials under the state racing law and rules of the Commissioner, and, on its face, did not violate any clearly established statutory or constitutional rights of Petitioner, based on the record.

Petitioner's claim in his petition that Respondents' conduct was ultra vires

and, therefore, not immune, because their official conduct toward Petitioner was allegedly performed in bad faith, with malice and religious bias, for the unlawful purpose of suspending his racing license and racetrack privileges because of his Jewish faith, has absolutely no factual basis or support in the Complaint or the record. Petitioner's claims are nothing more than factually bare conclusory allegations of impermissible subjective intent and purpose of the type specifically disfavored in Harlow, 457 US at 810. When Respondents filed their Motion for Summary Judgment with supporting affidavits and exhibits, Petitioner could no longer rest upon the broad conclusory claims of malice, bad faith and religious bias in his Complaint.

Under FRCP 56(e), Petitioner had an affirmative obligation to present specific evidence of factual support for such claims by way of affidavit or otherwise to show that there was a genuine issue of material fact regarding such claims for trial. As noted by the Court of Appeals, Petitioner presented no evidence of factual support for his claim of religious bias or other alleged improper intention, motive or purpose on the part of Respondents. Accordingly, based on the record, the Court correctly concluded that Petitioner had failed to make out a prima facie case to show the existence of any issue of material fact relative to such claims for trial.

In Harlow, this Court reaffirmed its position and expectation that

insubstantial civil rights damage suits against public officials, which are based upon broad, conclusory, factually-bare allegations of bad faith, malice, religious bias or other impermissable subjective intent or purpose--like Petitioner's suit--should not suffice to subject officials to trial, and should be terminated by federal courts on a properly supported motion for summary judgment under FRCP 56(b)(c). 457 US at 808, 815-818. Consistent with this admonition and the other controlling principles enunciated by this Court in Harlow, the Court of Appeals was correct in concluding that Respondents had factually and legally established their alternate claim of qualified immunity, and were, therefore, entitled to summary judgment pursuant to

their properly supported motion under FRCP 56(b)(c).

Accordingly, for all of the foregoing reasons, the decision of the Court of Appeals affirming summary judgment was correct and Petitioner's petition should therefore be denied.

II.

THE ISSUE OF RESPONDENTS' ENTITLEMENT TO QUALIFIED IMMUNITY FROM PETITIONER'S CIVIL RIGHTS DAMAGES SUIT WAS PLED AND BRIEFED IN BOTH DISTRICT COURT AND THE COURT OF APPEALS, AND THEREFORE, WAS PROPERLY BEFORE THE COURT OF APPEALS.

The issue of qualified immunity was initially raised by Respondents in District Court as one of their asserted affirmative defenses in their respective Answers to Petitioner's Complaint. Thereafter, it was raised again in District Court as an alternative basis for summary judgment in Respondents' Motion and Brief for Summary Judgment. On Petitioner's subsequent appeal to the Sixth Circuit Court of Appeals from the District Court, Petitioner and Respondents each submitted appellate briefs to the Court of Appeals wherein they each

specifically briefed the issue of Respondents' entitlement to either absolute immunity or qualified immunity.

It is a basic tenet of federal appellate law, that any issue which is pled and briefed in District Court is preserved for appellate review and decision in the Court of Appeals as a ground for affirming or reversing the District Court, even if the District Court did not decide the issue or base its questioned decision on the issue. Several decisions of this Court, including one of the cases cited by Petitioner, McGrath v Manufacturer's Trust Co, 338 US 241, 70 S Ct 4, 94 L Ed 31 (1941), support this principal. In McGrath, this Court essentially stated that it would only review issues on appeal which had been

raised in the trial court pleadings. 338 US at 249.

More directly on point with Petitioner's contention, this Court expressly held in Jaffke v Dunham, 352 US 280, 281, 1 L Ed 2d 314, 77 S Ct 307 (1957), that on appeal in the Court of Appeals:

> "A successful party in District Court may sustain its judgment on any ground that finds support in the record."

Furthermore, the Ninth Circuit Court of Appeals in Helena Rubenstein, Inc v Bau, 433 F2d 1021, 1023 (9th Cir, 1970), citing Jaffke, supra, and several other cases, held that:

> " ... it is proper for this court to affirm a summary judgment on any ground that appears from the record, whether or not the trial relied on it."

For all of the foregoing reasons, Petitioner's argument that the Court of

Appeals was without authority to decide the issue of qualified immunity, as an alternate basis for affirming summary judgment, is without merit; and accordingly, his petition should be denied by this Court.

RELIEF

For the foregoing reasons, Petitioner has failed to set forth any grounds for which the writ should be granted under Supreme Court Rule 17, and accordingly, his petition for writ of certiorari should be denied.

Respectfully submitted,

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